

JAN 16 2009

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED

JAN 16 2009

CLERK

City of Aurora, Illinois,
Village of Lake Zurich, Illinois,
Village of Bartlett, Illinois,
City of West Chicago, Illinois,
Village of Hawthorn Woods, Illinois,
Village of Wayne, Illinois,
City of Naperville, Illinois,
Village of Barrington Hills, Illinois
Barrington Township, Illinois
City of Warrenville, Illinois
Village of Plainfield, Illinois
DuPage County, Illinois
Lake Zurich Fire Protection District

Petitioners,

v.

Surface Transportation Board

and

United States of America,

Respondents.

09-1028

Case No. 09-

**EMERGENCY MOTION FOR STAY BY THE CITIES OF AURORA,
WEST CHICAGO, WARRENVILLE AND NAPERVILLE, ILLINOIS AND
THE VILLAGES OF LAKE ZURICH, BARTLETT, HAWTHORN
WOODS, PLAINFIELD AND WAYNE, ILLINOIS, LAKE ZURICH FIRE
PROTECTION DISTRICT AND DUPAGE COUNTY, ILLINOIS**

The above-named Petitioners (collectively referred to as “Communities” or “TRAC”) respectfully move this Court, pursuant to Fed. R. App. Proc. 18(a) and Circuit Rule 18(a), to stay the January 23, 2009 effective date of the December 24, 2008 Decision of the Surface Transportation Board (“STB” or “Board”) in STB Finance Docket No. 35087, *Canadian National Railway Company and Grand Trunk Corporation—Control—EJ&E West Company* (the “Decision”).

Statement of Justification for not Seeking a Stay from the Board.

The individual Communities, who are members of a group of communities known as The Regional Answer to Canadian National (“TRAC”), have actively participated as parties of record before the STB. Due to the fact that the STB did not serve its Decision until late on Christmas Eve, TRAC was unable to schedule a meeting to discuss hiring counsel and filing a joint Petition for Review before this Court until January 9, 2009. As a result, neither TRAC nor the Communities were able to request a stay of the STB’s Decision, as required by the STB’s rules, which would have required them to file for a stay within 10 days of the date of service of the STB’s Decision.

Communities are aware that the Villages of Barrington and Barlett, Illinois, and Will County, Illinois, consistent with Fed. R. App. Proc. 18 and Circuit Rule 18, previously filed petitions for stay with the Board. CN has filed its Reply. The outcome of the stay petitions are unknown as the STB has not yet ruled.

In addition, Communities are aware that Barrington has already filed an emergency motion for stay with this Court accompanied by the request that the Court issue its ruling on the stay motion no later than January 22, 2009.

Communities are also aware that the Court has issued an Order establishing the date for submission of CN’s response.

Recognizing the need for expedited handling, Communities will not repeat

the arguments raised by Barrington. Instead, Communities adopt by reference the issues and arguments advanced by Barrington. They will, however, raise one additional issue for the Court's consideration pursuant to the four-part test of *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). The basic thrust of Communities' position is that the Board adopted so-called "mitigation conditions" that fail to realistically address the multiple environmental concerns they raised. Furthermore, the Board failed to implement mitigation conditions that would have addressed the stated concerns of a majority of Board members regarding the efficacy of the various conditions recommended by the Board's Section of Environmental Analysis ("SEA"). It is the Communities' position that as a result of these deficiencies, the Board failed to satisfy the "hard look" mandate of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 ("NEPA"), and the implementing regulations of the Council on Environmental Policy ("CEQ"), 40 C.F.R. Parts 1500 *et seq.* While it may be true that the DEIS and FEIS are lengthy in terms of pages of paper, the Board member's unwillingness to address and resolve their own expressed concerns, much less those of the EJ&E Communities, undercuts any claim that the Board properly evaluated all reasonably foreseeable indirect effects and environmental consequences of its actions.

The STB's Decision authorizes Canadian National Railway Company

(“CN”) to acquire the rail lines of the Elgin, Joliet & Eastern Railway Company (“EJ&E”). The EJ&E’s lines, which are located in Northeastern Illinois and Northwestern Indiana, extend in a 120-mile arc of mainline track around Chicago. Approximately 3 to 18 trains per day currently travel along various segments of the EJ&E lines which traverse the Villages and Cities that are seeking this emergency stay. Because CN intends to divert multiple trains from the CN’s other five rail lines in Chicago to the EJ&E line, rail traffic along the EJ&E line will be increased by at least 15 to 24 freight trains per day.

In agreeing to the diversion of those trains, the Board openly recognized that the substantial increase of freight anticipated trains will have a permanent adverse impact on the communities that are located on the EJ&E. However, it chose to justify those adverse environmental impacts by focusing on the millions of dollars of annual revenues that CN will realize as a result of the shift and by touting the unanalyzed beneficial environmental gains that allegedly may be realized by those areas within Chicago subject to current CN rail operations.

This is not to say that the STB did not impose some mitigation conditions in order to make it appear that it was responsive to the harm that it recognized will accompany the shift of traffic. Indeed, the STB imposed 171 environmental conditions. While that number may appear to be significant, a careful review demonstrates that many of the so-called “mitigation conditions” merely require

consultation and coordination and do not bestow any meaningful benefits to the communities. Nor do they require CN to pay for the environmental damage that it will cause while enriching itself.

The weaknesses of SEA's mitigation were noted during the course of the STB's Public Meeting on "Issuance of CN/EJ&E West Final Environmental Impact Statement," held November 18, 2008. During that meeting, Vice Chairman Mulvey (Transcript at 220-21) offered the following assessment regarding the "soft" nature of the environmental conditions that were being suggested by SEA and CN:

Just speaking to an observation about the mitigation, about the voluntary mitigation and as well as the Board mitigation, there is, approximately, 170 mitigations that are called for. And yet, if I look at it very, very carefully, I find less than half a dozen that I would actually call mitigation in the sense that you are requiring the railroad to do something that otherwise it would not do.

All the railroads work with Operation Lifesaver. All the railroads work with communities, because they have to. And many of the mitigations that I read about here simply say you will obey the law. You will obey existing regulations. You will live up to the commitments that you have already made.

The mitigations that I see are the ones that relate to what the railroads have to spend on the grade crossings, the 15 percent to install grade separations. The installation of cameras at certain crossings, so that emergency response vehicles can see what is happening and respond more quickly is another true mitigation.

I was happy to see the turtles are being protected. I considered that to be a mitigation. They would not have done that on their own. But it strikes me that virtually everything else that we call mitigation are things that the railroads would likely have done anyway.

As the Court will see from a review of the conditions that were imposed, the Vice Chairman's observations were largely ignored. Instead, the Board, with but two major exceptions, rubberstamped the initial conditions that appeared in the DEIS and FEIS.

However, a majority of Board members specifically recognized that additional conditions were essential. In his comments approving the transaction, Vice Chairman Mulvey candidly stated as follows:

It is gravely unfortunate that this project will impact the communities around Chicago to the extent it will, and I am a proponent of the enhanced mitigations we are ordering here. Indeed, I would have preferred that the Board require additional and more stringent mitigations. Specifically, I would have preferred an approach that closely tied increasing levels of mitigation at applicants' expense to increasing levels of rail traffic, above the projections used in our analysis of this case. I will carefully scrutinize any divergence from applicants' projections -- both on rail and vehicular traffic -- in future oversight proceedings.

Commissioner Buttrey espoused a similar approach when he recognized "the high environmental impacts expected for the communities along the existing EJE lines, including several environmentally pristine nature preserves." (*Id.* at 57). While supporting the Board's decision to retain jurisdiction over this transaction

“and to continue oversight for at least five years and to impose monthly monitoring and public reporting on CN,” (*id.*), Commissioner Buttrey stated as follows:

I would have gone farther. Consistent with what a number of commenting parties requested, I would have imposed strict traffic caps on the existing CN lines within the City of Chicago as CN’s trains are shifted to the outer EJE lines, to ensure that the touted benefits of reduced traffic on the inner city lines would be preserved. In this connection, I would be willing to reopen this proceeding during the oversight and monitoring period if it appears that the applicants do not live up to the commitment to reduce the number of trains frequencies in the urban communities.

I also would have required applicants to reach a mutually-acceptable mitigation agreement with every impacted community along the EJE lines before rail volumes could be increased above pre-transaction levels. I commend CN for having reached agreements with many of the impacted communities. Although this process started slowly, the pace began to pick up toward the end of the proceeding after the strength of the opposition became clear. I feel strongly that this process should be allowed to continue. No one is in a better position to determine what mitigation measures are needed and appropriate than the affected community itself. In my view, this Board should not presume to know better than the affected communities what mitigation will be required in the public interest. If this transaction truly has as many potential benefits as applicants claim, then I believe that national, state and local officials would have every incentive to help CN and the affected communities along the EJE reach reasonable compromises in a timely fashion, so that the overall benefits of this transaction could be achieved.

Unfortunately, instead of taking the time to take a hard look at the potential

conditions which the Commissioners themselves identified at the tail end of the proceeding, the Board ducked them and approved the transaction with full awareness that SEA's "soft" environmental conditions are not sufficient to address the many, legitimate concerns voiced by Communities. At the same time, the Board failed to insist upon meaningful conditions that would force CN to abide by its own projections. Even if the Board in the future carefully scrutinizes future divergence from applicants' projections, it will be too late to undo many of the harms that could have been avoided had the Board members followed their own instincts.

Monthly monitoring and public reporting for a few years after the acquisition has been finalized will not provide the Board with the future ability to alter underlying terms and conditions of its approval so as to unscramble the environmental mess that it has fostered by failing to take a hard look at meaningful conditions. If meaningful mitigation conditions are to be imposed, they must be imposed at this time.

Rather than approving numerous "soft" conditions that impose no real burden on CN, the Board should have taken a hard look at the many concerns voiced by the Communities and documented the comparative costs that will result from its kid gloves approach. Had it done so, the Board would have been forced to conclude that, in most instances, the adversely affected communities along the

EJ&E are left to cover the overwhelming cost of mitigation, even though they are not responsible for any of the environmental damages occasioned by CN's business ventures and will never realize any financial gain from CN's ambitious plans. CN, however, despite the future untold millions that it will ultimately realize by virtue of the transaction will bear little of the cost of mitigating the environmental damage that its expanded operations will cause.

Nevertheless, at no time in this proceeding has the Board ever attempted to weigh or calculate, much less balance, the projected, comparative costs of its approval. Given the Board's acknowledgment that it has the requisite jurisdiction to impose environmental conditions as part of its approval process, the Board erred by failing to take a hard look at the relative comparative long-term costs and benefits. This is especially true in situations such as this where the Board has readily acknowledged the extreme adverse harm that railroad freight operations can cause to communities through which they operate, and where the Board authorizes the shifting of known harm from one area to another so as to financially benefit the railroad applicant at the expense of adversely impacted communities.

Once the Board's decision becomes effective, there will be no incentive for CN to bother working with Communities as CN will be free to run roughshod over them. Of course, had Vice Chairman Mulvey and Commissioner Buttrey jointly taken an approach that "closely tied increasing levels of mitigation at applicants'

expense to increasing levels of rail traffic,” as advocated by Vice Chairman Mulvey, or “required applicants to reach a mutually-acceptable mitigation agreement with every impacted community along the EJE lines before rail volumes could be increased above pre-transactional levels,” as advocated by Commissioner Buttrey, the Board could have prevented the irreparable harm that will begin as soon as CN is unleashed. There is, of course, nothing in the Board’s Decision that explains their inability or unwillingness to meet what appears to be a common objective that would have avoided the irreparable harm that will result from the Board’s Decision.

The bottom line is that the Board failed to comprehend or appreciate the unequal bargaining position of the parties. On the one hand, the CN, which over time will reap a financial bonanza as a result of the transaction, is in the position to take full advantage of the Board’s authorization to acquire the EJ&E by paying comparatively little or nothing for environmental mitigation, especially when amortization principles are considered. On the other hand, the Communities, which will gain nothing positive from the Board’s approval, will be forced to pay for mitigation for which they previously had no need and which will not result in any financial gain for them, now or in the future. Of course, if they fail to pick up the tab, they will suffer the harms forecast by the Board.

Most importantly, while the Communities feel that the Board should itself

should take a realistic, hard look at the conditions on its own motion, the bottom line is that the Communities would have no way to compel CN to negotiate, if they chose to do so, if the Board's decision is allowed to become effective on January 23. Because the Communities lack the financial wherewithal to bear the cost of the mitigation that would be needed even partially to offset the environmental harms caused by the transaction, they will be irreparably harmed if the Board is not required to level the playing field, which is well within the Board's power.

Given the foregoing, the public interest will be best served by staying the Board's Decision until judicial review can be accomplished. The STB will not be harmed by the requested stay. Any harms resulting to CN from the stay would be monetary and not substantial, particularly given CN's status as a large and profitable Class I railroad. Given the recent downturn in the world's economy and the well-publicized nationwide reduction in the number of trains being operated as a result of that turndown, CN should find less congestion on its lines through Chicago during the next several months. Given the extensive and irreparable harms facing the Communities contrasted with the slight and nonsubstantial harms that might result to other parties, maintenance of the status quo via a stay is appropriate.

On January 15, 2009, the undersigned counsel advised Jeffrey Kamarow (STB counsel) and Paul A. Cunningham (CN Counsel) that the Petitioners herein

would be filing a petition for judicial review and would be adopting, with the exception of one additional argument, the arguments of the Village of Barrington in seeking an emergency stay of the Board's December 24, 2009 Decision.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R.H. Streeter", with a long horizontal stroke extending to the right.

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(facsimile) 202-289-1330
Attorney for Petitioners

Date: January 16, 2009

UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

+ + + + +

PUBLIC MEETING

IN THE MATTER OF:

CANADIAN NATIONAL RAILWAY COMPANY
AND GRAND TRUNK CORPORATION -
CONTROL - EJ&E WEST COMPANY;
ISSUANCE OF FINAL ENVIRONMENTAL
IMPACT STATEMENT

Tuesday,

November 18, 2008

Surface Transportation Board
Suite 120
395 E Street, S.W.
Washington, D.C.

The above-entitled matter came on for
hearing, pursuant to notice, at 10:00 a.m.

BEFORE:

CHARLES D. NOTTINGHAM, Chairperson
FRANCIS P. MULVEY, Vice Chairperson
W. DOUGLAS BUTTREY, Commissioner

1 awareness to reduce, you know, those trespasser
2 events.

3 VICE CHAIRMAN MULVEY: Just speaking
4 to an observation about the mitigation, about the
5 voluntary mitigation and as well as the Board
6 mitigation, there is, approximately, 170
7 mitigations that are called for. And yet, if I
8 look at it very, very carefully, I find less than
9 half a dozen that I would actually call
10 mitigation in the sense that you are requiring
11 the railroad to do something that otherwise it
12 would not do.

13 All the railroads work with Operation
14 Lifesaver. All the railroads work with
15 communities, because they have to. And many of
16 the mitigations that I read about here simply say
17 you will obey the law. You will obey existing
18 regulations. You will live up to the commitments
19 that you have already made.

20 The mitigations that I see are the
21 ones that relate to what the railroads have to
22 spend on the grade crossings, the 15 percent to

1 install grade separations. The installation of
2 cameras at certain crossings, so that emergency
3 response vehicles can see what is happening and
4 respond more quickly is another true mitigation.

5 I was happy to see the turtles are
6 being protected. I considered that to be a
7 mitigation. They would not have done that on
8 their own. But it strikes me that virtually
9 everything else that we call mitigation are
10 things that the railroads would likely have done
11 anyway.

12 I'm not being especially critical. I
13 understand that these are things that need to be
14 looked at and then perhaps put in writing, but do
15 you want to comment on that, that these
16 mitigations are kind of soft, if you like? I'm
17 trying to just get your response to what the
18 communities are going to say about some of these.

19 MS. RUTSON: Some of them may appear
20 soft, for example, the liaison, the CN required
21 liaison to work with Illinois Natural Resource
22 and Water Resource Stakeholder Group. Now, that

CERTIFICATE AS TO PARTIES AND *AMICI CURIAE*

Parties and Amici

City of Aurora, Illinois
Village of Lake Zurich, Illinois
Village of Barlett, Illinois
City of West Chicago, Illinois
Village of Hawthorn Woods, Illinois
Village of Wayne, Illinois
City of Naperville, Illinois
Village of Barrington Hills, Illinois
Barrington Township, Illinois
City of Warrenville, Illinois
Village of Plainfield, Illinois
DuPage County, Illinois
Lake Zurich Fire Protection District

Respondents:

Surface Transportation Board
The United States of America

There are presently no *amici curiae* appearing before this court on appeal. However, the issues herein are related to the Petition for Review filed in Case No. 09-1002 by the Village of Barrington, Illinois.

All of the above-listed Cities, Villages, Fire Protection District and DuPage County are government entities and are not subject to the corporate disclosure statement requirements of Fed. R. App. 26.1 and Circuit Rule 26.1.



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Counsel for all listed Cities, Villages and
DuPage County, Illinois

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2009, a copy of the foregoing emergency Motion to

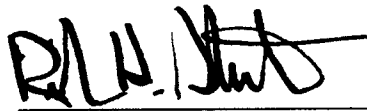
Stay was served via e-mail and by hand delivery on the following:

Ellen D. Hanson, General Counsel
Craig Keets
Evelyn Kitay
Jeffrey Komarow
Surface Transportation Board
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395 E St., S.W.
Washington, D.C. 20423-0001

Michael B. Mukasey, Attorney General (via hand delivery only)
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A handwritten signature in black ink, appearing to read "R.H. Streeter", written over a horizontal line.

Richard H. Streeter